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ABSTRACT

The Canadian Charter of Rights and Freedoms contains an implicit right to education, and the Charter's equality provisions offer an important tool for promoting the rights of the disadvantaged. The equality provisions are open-ended in nature and make the courts a new partner in educational decision-making, causing some educators to regard the Charter generally and the equality provisions in particular with fear. This paper examines literature and court decisions concerning the nature of the Charter, the reasonable limits on Charter rights, and the remedies for violations of these rights. It speculates on the impact of applying the Charter to education law and policy with regard to children who have special education needs. It addresses: (1) the constitutional right to education, including problems of access, the appropriate content of education, special education rights, and related services; (2) the classification of students and constitutionally fair procedures; (3) the confidentiality of and access to curriculum programs, students' records, and reports; (4) discipline, suspensions, searches, and other treatment of students with special needs; (5) the potential for malpractice suits and teacher accountability; and (6) reasonable limits and costs. (JDD)

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THE CHARTER OF RIGHTS AND SPECIAL EDUCATION: BLESSING OR CURSE?

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THE CHARTER OF RIGHTS AND SPECIAL EDUCATION: BLESSING OR CURSE?

*A. Wayne MacKay

Will the Charter be a blessing or a curse for special education in Canada? Who will benefit and who will lose? In addressing these broader questions this paper will examine the nature of the Charter, the reasonable limits on the Charter rights, and the remedies for violations of these rights. It will also speculate on the impact of applying the Charter to education law and policy with regard to children who have special education needs.

The following specific issues will be addressed:

1. the constitutional right to education, including problems of access, the appropriate content of education, special education rights and related services;

2. the classification of students and constitutionally fair procedures;

3. the confidentiality of and access to curriculum programs, students' records and reports;

4. discipline and treatment of students with special needs; and

5. the potential for malpractice suits and teacher accountability.

I Introduction

The Canadian Charter of Rights and Freedoms was crafted in the context of the strengths and weaknesses of the United States rights jurisprudence, the disappointing Canadian experience with our own Bill of Rights (1960) and from the political compromises leading up to its passage in 1982. The Charter allows for judicial intervention into governmental action, including educational decision-making, where traditionally only experts held sway. This alarms many educators.

The 1985 arrival of section 15 which guarantees equality rights, has been upsetting to some educators. Even a casual perusal of section 15 suggests a host of possible challenges to the existing education system. School boards discriminate on the basis of age at both the lower and upper limits for education. Sex discrimination in school athletics programs are still widely practiced. There are still many forms of discrimination in respect to teachers. Educators are saying that they are acting reasonably and that they do not have the necessary funds to advance equality in its fullest sense.

Educators are understandably reluctant to have lawyers too heavily involved in the shaping of education-policy in Canada and thus regard the Charter generally and the equality provision in particular, with considerable fear.

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Canadian tradition has been to resolve education issues in the political rather than the judicial arena. Courts, as part of their deference to the parliamentary process, have taken a hands-off approach to the decisions of school boards and school administrators. It is unlikely that lawyers and judges will quickly assume a new interventionist role. However, educational decisions which clearly violate the Charter, may force the resolution of education decisions through legal channels. This judicializing of education is a mixed blessing which will encompass both benefits and burdens for educators. The Charter also has the potential to enhance the development of Canadian education. There is an opportunity to be seized as well as an obstacle to be surmounted.

In the United States, the courts have been viewed as the logical forum for enforcing rights - educational and otherwise. Mills v. Board of Education (1972) is a landmark case in the educational rights of the mentally handicapped. A group of parents brought a class action seeking an injunction to prevent the exclusion of their seven exceptional children from the school system. The court concluded that there was a duty to provide an appropriate education for each child implicit in the compulsory attendance provision. Inadequate funding certainly cannot be permitted to bear more heavily on the "exceptional" or disabled child, than on the normal child. Such logic is applicable to all provinces which have similar compulsory attendance provisions in their Education Acts, subjecting parents to criminal style penalties. Also the American courts, in a number of "due process" cases, including P.A.R.C. v. Commonwealth (1971), have established rights to procedural protections before a child is excluded from a regular class or stigmatized by a label.

With the arrival of the Charter we will see disgruntled parents, who have become frustrated by the "quiet diplomacy" approach, prepared and willing to go to court. As J. Anderson (1985) and others predict "legal work will surely multiply in the next decade in the area of "schoolhouse law". However, it will not be to the same extent or with the same frequency as we see in the United States. This is due to our historical differences. The United States grew out of political and social revolutionary fervour and favours individual rights; whereas the Canadian experience has been quintessentially British with emphasis on preservation of social order. It is commonly accepted that Canadians are a more deferential people and consequently not as litigious. Whether this is really a matter of deference or not, the courts have not been a major policy forum.

It will be argued later in this paper that there is a right to education implicit in the Charter. The United States courts have rejected the claim that there is a constitutional right to education and instead such claims must be grounded in statute law. This may be another important difference between Canada and the United States, with the rights balance tipped in Canada's favour. Indeed, the express protection of the rights of the physically and mentally disabled coupled with claims to a constitutional right to education, may present a judicial as well as moral claim to government funding. The Charter's equality provisions offer an important tool for promoting the rights of the disadvantaged in Canada.

It is the open-ended nature of section 15 that intimidates both educators and lawyers. Courts, however, should not be seen as the enemy but rather as a new partner in the educational enterprise. There is a danger of introducing too much legalism into education but the best way to avoid this is for the educators

to attempt to put their own houses in order. If school boards, school administrators and teachers evolve a plan for implementing equality in the schools, the courts are less likely to interfere. The Charter has already caused many school administrators to modify institutional procedures and requirements, so as to avoid future legal problems. Educators may be more progressive in anticipating Charter challenges, than judges would require them to be.

As Cruickshank (1986) remarks, educators, like policemen, prison guards, tax collectors and Crown prosecutors, will learn to accomodate, if not embrace, the Charter and to live with the inevitability of litigation. Those who accommodate it best, will be those who appreciate that individual rights cases can improve the education system for generations to come. The courts are a new partner in educational decision-making.

II The Nature of the Charter

The Charter is part of Canada's patriated Constitution. In 1982, Canada adopted an entrenched package of rights which can only be changed by constitutional amendment or the proper use of the legislative override in section 33 of the Charter itself. This section allows Parliament or a provincial legislature to opt out of specific Charter rights including equality. In other words, if a legislature wants to preserve certain inequalities or to undo the effect of a court decision, it must simply pass a law declaring that its education statute operates "notwithstanding" the Charter. This section will not be used often, but it does give an elected government control over any excesses it perceives in the decisions of judges. Section 33 provides for political restraint on Charter rights.

It must be emphasized that the rights guaranteed in the Charter are not absolute. Courts are invited by section 1 to consider what are the "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". It may be hard to justify different levels of services between provinces as they are surely examples of "free and democratic" societies. It may be a reasonable limit for a school board to only supply the kind of special services that they can afford in times of financial restraint. It is possible that the broad remedial powers contained in section 24 may also be subject to the "reasonable limits" clause.

The burden is clearly on the state (in the field of education, this would be the Department of Education, school boards, administrators and teachers) to demonstrate that any limitations on rights are reasonable. This is the mechanism that will be used in order to balance the competing rights of individuals and society. The traditional "hands-off" approach of the courts in matters of education will incline them to listen carefully to governmental objectives. De Zwager and Stewart (1983) comment that if most limitations are found to be valid under section 1, then the Charter will be a weak document. However, if the courts are reluctant to permit restrictions on rights, then the Charter could become a powerful tool in securing many advantages which have been denied to the disabled in the past. The recent Supreme Court of Canada ruling in R. v. Oakes (1986) suggests a sparing application of section 1 and a broad reading of rights. This is encouraging.

The Canadian tradition is not one of judicial activism in school matters but

rather one of deference to the educational experts. It is safe to predict that judges will not revolutionize the education system. While the potential for innovative remedies is broad, the reality likely will be more conservative. The judicial role has expanded but there will be no revolution.

What are "reasonable limits" in a "free and democratic" society? This will pose a difficult problem for judges and will require the examination of evidence from experts in the field. The judge in Bales v. Board of School Trustees (1984) did not rely exclusively on statute analysis to resolve the legal issues. Educational experts presented evidence on the desirability of "mainstreaming" students with handicaps and the importance of putting them in the "least restrictive environment". These experts were drawn from both Canada and the United States.

A full canvass of the potential impact of the various Charter sections on the lives of the disabled is presented by de Zwager and Stewart (1983). Only the highlights will be mentioned here and the focus is on education. Sections 3 and 4 provide for the right to vote in federal and provincial elections and to be elected as a Member of Parliament or as a Member of a Legislative Assembly. These sections safeguard our democratic political structure. There are existing laws which say that some people may not vote - for example, the Canada Elections Act disqualifies prisoners from voting in federal elections. There are similar provincial laws which disqualify the mentally handicapped person from voting or offering for election. Everyone is entitled to a right to vote without discrimination based on mental disability. Thus the burden shifts to the state to demonstrate that statutory limits on the right to vote are reasonable. This could extend to involvement in student government in the school context.

Section 6(1) of the mobility rights clause applies only to citizens, so will not help in the challenges to parts of the Immigration Act which restrict the admission of disabled persons into Canada. It can be argued that section 6(2) includes a right to travel as well as take up residence. Therefore, Air Canada, Via Rail and other government agencies cannot formulate policies which prevent disabled persons from travelling. It can even be argued that these agencies have a positive duty to make transportation accessible to the disabled. Section 6(2)(b) does guarantee the right to pursue the gaining of a livelihood in any province. The Supreme Court of Canada in Re Skapinker (1984) concludes that section 6 guarantees mobility between provinces but not within a province, but mobility within a province has been based on "fundamental justice" in section 7 Re Mia (1985). The Supreme Court emphasizes in Re Skapinker that there is no guarantee to a livelihood but only mobility to seek it.

Sections 8 to 14 set out a list of legal rights and these sections need not be limited to criminal law. Section 9 gives everyone a right not to be arbitrarily detained or inprisoned. Section 10 provides that everyone on "arrest or detention", has the right to be given reasons promptly and to obtain a lawyer "without delay" and to be told of that right. Section 14 says that a party or witness in any proceedings, who does not understand or who is deaf, has the right to the assistance of an interpreter. "Proceedings" is a broad term and might also apply to formal hearings in some government-funded institutions, such as public schools, hospitals and universities. It could also be argued that being given such a right means the courts or boards must pay if you cannot afford an interpreter.

The package of legal rights may be particularly important to inmates of mental institutions. While they have not been charged with an offence and are thus excluded from the protections of section 11, they are detained and entitled to "fundamental justice" in accordance with section 7 and to be free of "cruel and unusual treatment or punishment" as guaranteed by section 12. Other provisions such as reasonable search guarantees in section 8 would also apply. These same rights are also applicable to the special education class or residential institution.

Section 23 of the Charter which guarantees rights to minority language education where numbers warrant, and separate school rights in section 29 are the only Charter provisions that expressly refer to education. Since there is a right to have children educated in English or French, it can be argued that this implies a right to education for all. Challenges under these provisions will generally involve significant legal as well as financial and structural implications for education in Canada.

Sections 7 and 15 provide the greatest potential for legal challenges. Does "security of the person" or the concept of "liberty" entitle the child with a disability to an education? In the United States the concept of liberty has been argued in such an expansive way albeit unsuccessfully to date. In the Charter these rights are stated in a positive rather than negative form and this may be significant.

In Weinstein v. Min. of Education for B.C. (1985), the following broad definition of liberty was adopted from the United States Supreme Court.

> Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (emphasis added)

These sections will have the greatest impact on special education and will be explored in detail in later parts of this paper.

Most educational rules and decisions involve some form of discrimination in the broad sense. Compulsory schooling for ages 5 to 16 years is age discrimination by the very existence of these age categories. The courts will be loathe to extend the scope of free public education on the basis of age discrimination. Therefore, publicly funded schooling below and above the compulsory school age range will probably remain at the discretion of school boards and departments of education. Educators may have to justify such age cut offs as reasonable and not just arbitrary and for convenience.

The most compelling case of equality rights could be made for the eighteen and over children who have special education needs. Time is often the "enemy" for children with disabilities. They have the capacity to learn a great deal but often cannot accomplish this potential within the ordinary school years, and therefore the automatic age cut off at 18 or 21 years of age can be very negative, Cruickshank (1986). The effect of a particular cut off age for

schooling can have a disparate impact which works to the disadvantage of those in special education classes. It could be argued that the school system must provide enough resources for them to achieve true equality and this may demand an extended school period.

If the United States experience is followed, there may be different categories of protection resulting in strict, intermediate and minimal scrutiny. A strict scrutiny case is one involving a classification based on race or ethnic origin. Such classification will be regarded as inherently suspect by the courts. The law maker or administrator has the burden of showing that there is a compelling, overriding state interest in maintaining the law, in spite of its discriminatory content. At the other end of the scale, a minimal scrutiny test applies to laws which discriminate for social or econmic reasons which are outside of the enumerated list in the Charter.

MacKay (1986 a) argues against importing the American levels of scrutiny into Canada but concludes that the standard of justification expected from the state will vary in accordance with the type of discrimination. Thus it is easier to support a section 1 limitation on age than on sex or race. It has been suggested by Cruickshank (1986) that intermediate judicial scrutiny may be appropriate for the classification of "age" and "mental and physical disability". In Canada, where age and disability are explicitly enumerated, the burden will rest with the government to justify limitations. However, the threshhold for establishing rational governmental objectives and means, and thus reasonable limitations, may not be terribly high.

Section 15 does provide for Charter arguments on a number of combinations of rights. This would include discrimination based on age and disability as discussed earlier in relation to the outer limits of compulsory schooling. Sections 23 and 15 provide an interesting combination. Does a parent have a right to special education in an official minority language? It could be argued that a parent should not have to choose between either section 23 or 15 rights and that provision should be made in minority language education programs for those with disabilities. Indians who suffer from a disability may be subject to two levels of discrimination - race and disability. Indians should have the same access to special education services as their counterparts in the provincial structure. Many other combinations are possible.

Under section 24 of the Charter, courts have a broad power to give a remedy to persons denied a right protected by the Charter. They could order compensation or force a school board to take corrective action. Where the language of the law itself produces inequality, the courts can under section 52 of the Constitution Act, 1982 declare the law to be of "no force and effect". The combined effect of these remedial provisions is to give courts a potentially expansive role in shaping Canadian society. When these broad remedial powers are combined with section 15, the possible results are staggering. The net effect is that judges can give any remedy that is "just and appropriate".

Although the potential is great, in fact the remedies will undoubtedly be conservative. This point can best be highlighted by quoting two passages from Mahe v. The Queen (1985).

> Compliance with the Charter cannot be achieved instantaneously and as long as reasonable progress is being made,

> the court should not interfere ...
>
> Courts must not interfere by decreeing methods or becoming involved in ongoing supervision or administration. (emphasis added)

It is important to appreciate that the courts will not try to achieve precise equality. It will be rough equality and, if American jurisprudence is followed, the legislatures will still be permitted to treat different classes of persons differently, so long as that classification is reasonable.

Remedies such as the United States busing model for constitutional violations have been both complex and controversial and should be avoided. The American Supreme Court has not hesitated to override the policy-making and spending functions of school boards. Cruickshank (1986) rightly predicts that Canadian courts, being more comfortable with exclusively legislative controls over policy and expenditures, will probably be slow to advance such remedies. This is indeed the message from the recent decision in Dolmage v. Muskoka Board of Education (1985). The court held it should not get into the details of enforcement of the "appropriate" placement of a student under the Ontario statutory structure. De Zwager and Stewart (1983), in a more activist vein, predict that if the courts are creative in granting remedies for violations of the rights of disabled persons, it may be possible to attain goals through legal action where political lobbying has failed. The truth of that prediction remains to be tested.

With regard to available remedies it should be noted that the American Supreme Court in Smith v. Robinson (1984) required that administrative remedies be exhausted in all disputes regarding the provisions of special education services to children with handicaps, before coming to the courts. In Canada administrative law was similar in that the sole judicial remedy to enforce the Education Acts was a judicial review application brought subsequent to an internal administrative hearing procedure. Whether a person must exhaust internal remedies before pursuing a Charter claim is not clear. It should also be noted that the courts do not have a monopoly on Charter issues, which can also be raised before administrative bodies. While the remedial potential of the Charter is great the early signs are that both courts and boards will proceed cautiously.

III Constitutional Rights to Education

A. Education in General

Special education is on the front line of education rights and will likely blaze the judicial trail in respect to constitutional rights to education. Courts will be required to determine when distinctions made relating to education are valid and defensible under the Charter. There will be an increasing focus on the courts as vehicles for defining educational rights.

When we are speaking of rights to education it should be pointed out that the right belongs to the child and not the parent although it is often the parent or guardian who makes the claim on behalf of his/her child [MacKay (1984 a)]. American courts have found there is no constitutional right to education but have

instead enforced the statutory right, under the Education for All Handicapped Children Act, to free and appropriate education. Support has also been found in the equal protection clause of the American Bill of Rights.

Canadian jurisdictions have been slow to enact positive legislation guranteeing education rights. Only two provincial human rights codes list education as a right (Saskatchewan and Quebec). The greatest strength of this approach may be in its underlying philosophical premise that education is a fundamental human right. There are limits on the human rights protections even in these codes and the guarantees to education in the relevant Education Acts are even more limited [Cruickshank (1982)].

Cruickshank (1986) argues that the right to education must be found in statutes and that Charter decisions can push toward this by highlighting the most obvious inequalities for the disabled. Hopes of many Canadian organizations supporting the rights of the disabled will be dashed unless provincial education acts are reformed to guarantee a right to an "appropriate" education. Canadian courts may apply some pressure but will not embark upon the rewriting of provincial education statutes, according to the Cruickshank view.

The author of this paper disagrees with the Cruickshank analysis and argues that there is a right to education implicit, if not explicit, in a number of the sections in the Charter. There may be a constitutional right to education in Canada in contrast to the situation in the United States. In this respect Canada may be more progressive than her southern neighbour. On the Cruickshank analysis Canada would have the same approach as the United States.

Before dealing with the relevant sections of the Charter it should be pointed out that at the international level Canada has clearly accepted that children have a right to education. Canada is a signatory to the United Nations declarations proclaiming the rights of the handicapped. This includes a commitment to the International Covenant on Economic, Social and Cultural Rights which supersedes the Universal Declaration of Human Rights and the Declaration of the Rights of the Child. Each of these asserts that a child has a right to an appropriate education tailored to his or her individual needs.

While Canada is bound by international law to observe these declarations, they have no automatic legal impact in Canada. They certainly can be used as guidelines to interpreting the relevant provincial legislation and to invoke the power of moral suasion. When state law is ambiguous it should be interpreted so as to fit with international obligations.

One of the unique features of the Charter, which sets it apart from its American counterpart, is that it does make express reference to education in two different sections. The reference to denominational schools in section 29 is a reflection of Canadian history. Religion and education have been closely linked in Canada unlike the separation of church and state in the United States [MacKay (1984 a)]. The other section is 23 which is a reflection of Canada's bilingual and bi-cultural identity, which is another distinguishing feature from the United States scene.

Section 23 states that a citizen, who is a member of either the English or French speaking minority in a particular province, has the right to have their child educated in the minority language. This right is qualified by the

expression "where numbers warrant". If there is a guarantee to be educated in either of Canada's official languages this surely implies that there is a right to be educated in a particular language without also guaranteeing education would be offering a vehicle but denying roads and destinations. Furthermore, the "where numbers warrant" limitation applies to delivery in the minority language and not the implicit guarantee of education.

Under section 7 of the Charter everyone has the right to life, liberty and security of the person. A compelling argument can be made that in today's society there is no "liberty or security of the person" without a proper education. If life is read broadly enough to embrace a quality of life, a denial of access to education could be a violation of this right, as well. The liberty interest has not been so interpreted in the United States but the different and positive wording of the Canadian Charter may produce a different result north of the forty-ninth parallel. The exact wording of section 7 reads as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

It is possible that this section contains a single inter-connected right and that there is no separate guarantee of "life, liberty and security of the person" [Re B.C. Motor Vehicle Act (1985)]. Such a conclusion is softened by the Supreme Court of Canada's related conclusion that "fundamental justice" has both a procedural and a substantive component [Re B.C. Motor Vehicle Act (1985)]. This would allow for broader judicial review of decisions related to education.

As early as 1954, the United States Supreme Court recognized the vital nature of education in a democratic society in the famous case of Brown v. Board of Education (1954). It is even more compelling in the 1980's then it was thirty years ago [MacKay 1984 b]. Without an equal opportunity to education the "free and democratic society", which is the touchstone of section 1 of the Charter, and the democratic rights guaranteed in sections 3-5 are meaningless. Democracy presupposes an educated electorate.

Rights to education may be prerequisites to the exercise of free speech guaranteed by section 2(b) of the Charter. The American courts have given conflicting judgments on holding education as a basis for the exercise of the right to free speech. In San Antonio v. Rodriquez (1973) differing financial support from one state to another for education was upheld as constitutionally valid. Education was rejected as a fundamental right, even as a prerequisite to free speech. Almost a decade later, the United States Supreme Court in Board of Education, Island Trees v. Pico (1982) held that an informed and educated citizenry is a precondition to meaningful free speech. The latter decision has been controversial and there were many different opinions. One conclusion of Pico was that there is a right of access to ideas. This is a good foundation for a right to education. Section 7, supported by related sections, does provide a constitutional base for the right to education.

B. Special Education Rights: Section 15

Section 15 is written very broadly in terms of equality and has two important aspects, first section 15(1), the positive guarantee of equality and

second, section 15(2), a provision which allows affirmative action programs. The specified types of discrimination in section 15(1) are only examples of the kind of discrimination that could produce inequality. Undoubtedly, early cases will focus on the enumerated forms of discrimination. The express reference to physical and mental disability invites an argument for special education classes, provided on a basis of equality. Indeed, even an affirmative action program pursuant to section 15(2) could be required to give true equality to those who suffer from physical or mental disabilities.

The importance of equality rights is that they do not depend on a prior finding of a legal right to education or schooling. Section 15 simply declares "equal protection and equal benefit" of the law whatever that law may be. Therefore, if an education statute or regulation provides any protection or benefit, whether described as a "right" or not, it must be dispensed on the basis of equality between the disabled and the non-disabled. However, the conferral of the benefit or protection must be found outside section 15. As indicated above, section 7 of the Charter is one likely source. Statutes and regulations provide other sources.

It can be argued that the interpretation of "equal benefit" is to include equal educational opportunity. Since the Quebec and Saskatchewan Human Rights Codes and some provincial education statutes guarantee education, equality may demand the same of other provinces. Section 15 undoubtedly will spawn arguments that all persons in all parts of the province should have access to proper and well-funded special education programs. Section 15, like all Charter provisions, is subject to reasonable limits under section 1. School boards will argue that it is reasonable for rural school boards to provide less in the way of special education services because they have a smaller budget. Even such economic arguments can be countered. If special education needs of children are not met in the schools, they will likely cost society more in the future. The section 1 reasonable limits argument will be explored in more detail later.

Before turning to the Canadian situation it is useful to briefly consider the extensive American experience concerning the legal rights to education for the disabled. Many books have been written on the American situation, one of the most recent is by H.R. Turnbull III (1986). Free Appropriate Public Education: The Law and Children with Disabilities. The main message of this and other books is that the advancement of educational rights for the disabled has more to do with statutes than the Bill of Rights.

The United States has no enumerated list like Canada's section 15 of the Charter. However, the mentally disadvantaged have been recognized as a "discrete and insular minority, deserving of constitutional protection", in Cleburne Living Center v. City of Cleburne (1984). This same use of the equal protection clause could apply to the physically disabled as well. The facts of Cleburne involved a zoning exclusion of group homes for the mentally disabled but the same logic could be applied to education.

A major piece of legislation in the United States has had a considerable impact on the provision of special education services. Congress has established in the Education for All Handicapped Children Act (1975), a statutory right to free and appropriate education. Failure to provide such education could result in the offending state being denied federal funds. The federal power of the purse is important.

This legislation has resulted not only in increased demand for diagnostic services, but also resulted in government guidelines pertaining to student placement decisions. In Canada, there is no standard legislation for the provision of special education. It varies from the least definitive in Prince Edward Island to that of Ontario which emulates the United States Act [Kimmins, Hunter and MacKay (1985)]. It is highly unlikely that we will follow the United States, however, in imposing "strings-attached" funding for special education. This would be an invasion of the provincial control over education. The lack of a federal presence in Canadian education makes the situation quite different from the United States. It means that the imposition of minimum uniform standards will be by way of the Charter. Thus the Canadian battleground will be a constitutional one while the American one has been largely statutory.

The framework for the constitutional battles will be the guarantees of equality in section 15. The simple reality is that there is not going to be any one theory of equality either among judges or among Canadians generally [MacKay (1986 a)].

Section 15 is clearly a non-discrimination guarantee, both in its general prohibition and in its particular prohibitions on specified grounds. In addition to non-discrimination, Lepofsky (1984) adds that there is broad support for the view that section 15 also guarantees equality of opportunity to all Canadians. This view of equality could involve the courts in a positive as well as negative role in upholding the Charter. Judges could be required to mandate special education programs in order to produce real equality of opportunity. Section 15(2) of the Charter at least invites affirmative action programs, to ameliorate the conditions of the disadvantaged, and declares such programs as in accordance with equality. A positive approach to section 15(1) could result in courts mandating affirmative action.

In discussing the focus of potential Charter litigation Cruickshank (1986) stresses it cannot be a demand for the right to education, measured in equal test results and equal diplomas. It can only be a demand for equal opportunity to receive an education suited to the child's individual needs. He adds that even defined in this way, there is only so far that the courts will go in order to establish opportunities and meet needs. However, there is an even bolder claim that section 15 mandates equal results.

The broadest, and desirable interpretation of equality, is the one which calls for equal outcomes. This theory will focus attention on the actual impact and results of legal and governmental policies. Judges here would be involved in mandating positive programs to promote equal outcomes. However, judges are likely to be slow to adopt such an extravagant definition of equality.

So the definition of equality will continue to be a difficult and challenging task for judges and educators in the days ahead. Furthermore, acceptable definitions of equality will change over time. How we define equality will be crucial to the practical impact of section 15 [MacKay (1986 a)].

C. The Content of Constitutional Rights to Education

Declaring a right to education is the easy task, the difficult one is giving content to that right. Even when some content has been given to the right,

another difficulty emerges in assessing whether the right or rights are distributed on a basis of equality. Turning to this latter point it is obvious that equality is not violated merely because different groups are treated differently. Indeed, failing to make special arrangements for the disabled would be a clearer violation of equality. Many forms of discrimination are reasonable and even desirable. The problem is that discriminations are made on the basis of stereotypes as well as empirical evidence about needs. One example is the mistaken assumption that mentally disabled children can not benefit from physical education. The key to the equal distribution of benefits is not identity of treatment but the avoidance of stereotypes.

Turning to the problem of defining the content of a right or rights to education, there are no simple solutions. Neither rights nor education have been adequately defined so the task of defining rights to education is doubly complex. In this paper the content of rights to education will be explored in relation to three headings:

1. Access to Special Education
2. An Appropriate Content
3. Related and Auxiliary Services

While these headings do not solve the problem of definition, they do provide a framework for analysis.

1. Access to Special Education

There are preliminary problems with defining who is disabled and entitled to special education programs. In Ontario, under Bill 82, the definition of who is entitled to special education programs wisely was left to the more flexible regulations. Those entitled range from the gifted child to traditional categories such as physically handicapped, emotionally disturbed and learning disabled. Would a child with Acquired Immune Deficiency Syndrome (A.I.D.S.) be included as "disabled" and thereby entitled to equal educational opportunity? In the United States there has been a debate on this with some school boards regarding A.I.D.S. as a physical disability. A recent volume of The Special Educator explored the question of whether A.I.D.S. was a special education problem.

There are conflicting views by the American and Canadian courts on the issue of whether the content of rights to education includes access to special education. Canadian courts in Bales (1984) and Carriere (1978) have ruled that local school boards should provide access to an education. In Pierce (1976) a United States court held that there was neither a statutory nor a constitutional duty to place a child in a special class. Allowing access to an existing class and mandating the creation of one are different matters. Courts in both Canada and the United States have been reluctant to mandate the spending of government funds [San Antonio v. Rodriguez (1973)].

Problems of access and appropriate content are closely linked especially when the entitlement to a special education program is contingent on deriving educational benefit. It is the requirement that students must benefit from the special education program in Nova Scotia which allows the exclusion of students in accordance with regulations under Nova Scotia's Education Act. Whether such

exclusions are constitutional has yet to be tested but the validity of the regulation has been questioned in the academic literature [MacKay (1984 c) (1985 a) (1985 b)].

D. Harmer (1985), Director of the Atlantic Provinces Resource Centre for the Visually Impaired looks at various theories of equality and human rights. He quotes one theory by Williams as presented in Weinberg (1981), which states that human rights should only be extended to persons who "have the capacity to feel pain, affection or desire self-respect". However, other theories suggest that all human beings must be treated equally. Cruickshank (1986) suggests that under no circumstances may less educational funds be spent on a very low functioning child than on a "normal child". Harmer replaced the word normal by "visually impaired". These comments apply to questions of appropriate content as well as access. What are at stake are basic questions about what it is to be human and the limits of education.

This discussion of who is educable begs a definition of education. Education is learning resulting from teaching: teaching producing no learning is not education, and still less is mere attendance at school. Harmer (1985) includes an element of training as falling within the definition of education. If a child is not benefitting is it a problem with the program or the child? Surely the program should be designed to suit the child rather than the reverse [MacKay (1985 a)].

Will the Charter and section 15 in particular be used to give all children regardless of disability access to an education? Carriere v. Lamont Board of Education (1978) does indicate a general right of access but the Alberta Supreme Court refused to mandate the provision of a special program. In Bouchard v. Comm. d' Ecoles de St. Mathieu-de-Dixville (1950) the Supreme Court of Canada limited the obligation of school boards to providing education for mentally disabled students who could benefit from such instruction. This conclusion cannot be dismissed as a relic of the past because the same approach was followed in Doré v. La Comm. Scolaire de Drummondville (1983), a decision of the Quebec Court of Appeal. Thus even the Quebec human rights legislation did not prevent an autistic child from being excluded from the school system because her behaviour was too bizarre for the school system [O'Reilly (1984)].

All of the above cases preceded the coming into effect of section 15 of the Charter on April 17, 1985. As stated one of the prohibited grounds of discrimination under this section is on the basis of mental or physical disability. Thus a denial of access to education on the basis of disability would on the first analysis appear to be a violation. The burden then shifts to the school authorities to justify their exclusionary law or policy as a reasonable limit under section 1 of the Charter [Hunter v. Southam (1984)]. Thus educational authorities must demonstrably justify that the child would not benefit from education or possibly that the cost of providing it in both social and economic terms would be prohibitive. Their task will be much easier if some other state agent is willing to accept responsibility for the rejected child. The effect of section 15 of the Charter should be to entrench the concept of "zero-reject", with a heavy burden on state authorities to demonstrate why a child should be excluded. On questions of access the Charter will have a significant impact.

Turning to the situation under the Canadian Charter, some early commentators

have argued that there may be an affirmative duty in the state to provide "life, liberty and security of the person" [MacKay and Holgate (1983) and Boyle (1984)]. It can be forceably argued that there will be no real liberty and security of the person for the handicapped unless they are given full access to education. In many cases this will require positive governmental actions; such as, creating special classes, hiring well trained teachers, and making school buildings accessible. Physical and mental disabilities do result in some human limitations, but it is the circumstances in which these people find themselves wich determine whether these disabilities will become serious handicaps.

There are also basic questions about what constitutes a physical or mental disability, within the meaning of section 15 of the Charter. Is a gifted child mentally disabled? Probably not, but he or she may be handicapped within an education system geared to the "normal" child. Does a person with A.I.D.S. have a physical disability, justifying a special education program? The answers to such questions have direct implications for both questions of access and content. Thus both the coverage and scope of sections 7 and 15 of the Charter remain to be decided by the courts. This makes clear prediction difficult.

2. An Appropriate Content

Neither American nor Canadian courts have been anxious to define the appropriate content of an educational program. Mandating equal access is one thing; designing an appropriate educational content is quite another. While courts in the United States have been more adventurous than those in Canada even the former are reluctant to second-guess the educational experts. The following quotation from the United States Supreme Court in Wood v. Strickland (1975) is representative.

> We think there must be a degree of immunity if the work of the school is to go forward; and however worded, the immunity must be such that public school officials understand that action, taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances, will not be punished and that they need not exercise their discretion with undue timidity.

In Canada where there is even a stronger tradition of deferring to the elected branch of government courts have embraced a "hands-off" approach to education programs. Even after the arrival of the Charter this sentiment has prevailed as evidenced in the following passage from Dolmage v. The Muskoka Board of Education (1985).

> The priorities of the Board in the process of phasing in special education programmes was a matter for the Minister, not the Court. Control over the suitability of each Board's plan lies with the Minister - his approval of the Muskoka Board's plan was required and was obtained, as it was for the several annual revisions of the plan. The ministerial approval is the means by which the Minister can be assured that government policies are followed. Since the Muskoka plan was satisfactory to the Minister, it is not for the Court to meddle with the details of implementation of

> government policies nor with the rate of progress of their implementation. Those are administrative, financial and policy matters primarily. Equally I do not think it is for the Court to attempt to take over the control of such matters even though our American brothers have done so in some instances. I am not at all tempted by their example. It is my firm view that matters of that kind are for elected officials and not for judges and I readily confess to possessing no aptitude for such a role.

While this is only the view of one particular court it is likely to be widely shared. A similar sentiment was expressed in the earlier Bales case (1984). The first significant case to raise section 7 in the special education context is Bales v. Board of School Trustees (Okanagan) (1984). The court held the Board was acting reasonably in offering special classes in a residential setting. The segregation, though against the parents' wishes, was imposed to further the provision of an adequate education and as such was a reasonable education decision. While it was not an ideal placement it was a reasonable one. The school board view prevailed. If this case had arisen after section 15 of the Charter came into effect, the burden to demonstrate reasonableness might have been placed on the education authorities [MacKay (1984 d)]. As it stood the parents were required to show that the placement recommended by the school board was an unreasonable one. It is not clear that this shifting of the burden would change the result.

The Bales case rejected judicially enforced mainstreaming. Although the court was convinced of its general desirability, it did not wish to interfere with the judgment of the educators. While Bales pre-dates section 15 of the Charter, the court likely would not have mandated mainstreaming even in the face of section 15 prohibitions against discrimination based on disability. Courts are likely to be receptive to reasonable limits arguments cast in terms of the rights of the other students in the mainstream class. At least the educators would have to show that the alternative to mainstreaming was a reasonable one to meet the section 1 test of the Charter. Before considering the other early Charter cases, the American experience will be considered in capsule form.

In order to comply with the federal Public Law 94-142 (already referred to as the Education for All Handicapped Children Act of 1975) states must ensure that school districts offer each emotionally handicapped child a "free appropriate public education in the least restrictive environment". In Timothy W. v. Rochester School District (1985) an "appropriate" special education program was defined as one which confers some educational benefits, but not necessarily one which enables the child to reach his or her full potential. In reaching this conclusion the New Hampshire court was echoing the words of the United States Supreme Court in Board of Education of Hudson School District v. Rowley (1982). The Timothy W. case concerned the education of a severely disabled child and his educability and thus raises issues about related services as well as the basic instruction program.

An appropriate education means more than merely having the right to take up a space in the classroom. Some American courts under P.L. 94-142 have gone so far as to order school authorities to develop an educational program suitable to the needs of an individual handicapped child. However, there have been other American decisions, such as Harrell v. Wilson City Schools (1982) where the court

held that a child was not entitled to an ideal or even most appropriate placement. The parents claim for a grant to cover the cost of sending their thirteen year-old hearing impaired child to a leading school was denied.

It is unlikely that the content of an appropriate program will be judicially determined in Canada. This view is supported by the early cases. In Yarmology v. Banff School Dist. No. 102 (1985) the Alberta Supreme Court did not order a particular placement because of the discretion allowed to the school board under section 145 of the School Act regarding a change of placement. The decision was declared a nullity on the grounds that the School Board had failed to act in accordance with fair procedures. Then in Dolomage (1985) the Ontario Supreme Court deferred to the Muskoka School Board on the "reasonable content" of an appropriate program during the phase in period under Bill 82. The Alberta Supreme Court ruled in Carriere (1978) that the child has a "right to schooling" but refused to require a program of special education or individual help for the student in the regular classroom. There are no signs of a judicial definition of appropriate content.

Many school boards still provide a special curriculum where controversial topics such as sex education are avoided altogether. The burden would be on the school authorities to justify such special treatment under Section 1 of the Charter. Lepofsky (1984) argues that justification for such unequal treatment of the disabled are often based upon inaccurate stereotypes and underestimates of what disabled people can do. In his view, all the listed grounds, including age and disability should produce the same level of judicial scrutiny. While Lepofsky's view is logical, judges will be more likely to uphold laws that discriminate on the basis of age and disability than on sex or race [MacKay (1986 a)].

Courts and educators have given consideration to the learning environment that should be provided to the disabled. Mention has already been made of the American court decision in Harrell v. Wilson City Schools (1982) where the child with a hearing disability was entitled not to ideal or even most apprpriate placement, but only to the "least restrictive environment". The Supreme Court of Canada in A.G. Que. v. Quebec Protestant School Board (1983) held that rights should only be limited as little as will achieve the "necessary and desirable government objective". This restrictive approach to section 1 limitations on rights has been re-affirmed in the Supreme Court of Canada decision in R. v. Oakes (1986). De Zwager and Stewart (1983) in writing about the "least restrictive alternative" describe it as providing an environment for the child that is as close to the normal classroom as possible. This they hold would mean the removal of architectural barriers and the provision of auxiliary aids. The least restrictive alternative may not only fit educational theory but also a Charter which operates on the premise that rights should only be limited to the extent that is necessary to achieve "substantial and pressing" government objectives.

Although there was some discussion of the least restrictive educational setting in Bales (1984) the courts were unwilling to insist on it. While such a constitutional standard for measuring the appropriateness of a program has logical appeal, the courts have still been reluctant to define educational content. The educators remain the primary decision-makers in this area.

3. Related and Auxiliary Services

There is a growing acceptance on the part of the educational community that students with special health needs can and should be managed in the most normal setting possible. Among the special medical procedures which may be required by students are the following: administration of drugs, postural drainage, catherization of bladder and tube feeding. Because of the legal, ethical, moral and professional implications of the issues surrounding the provision of such care and treatment, school boards are finding it increasingly necessary to develop standards and procedures related to these special health services for students with disabilities. The Metro Toronto Public School Board includes the following in their recently approved Policy and Procedures (1983): a written management plan, written parental and medical approval, preparation, training and clarification of roles and responsibilities, collaboration with the Department of Public Health, legal and insurance agents.

At present the policies of Teachers' Unions, such as the Nova Scotia Teachers' Union, seem to not be opposed to teachers providing paramedical services to "exceptional" students. Such groups are usually advised by their legal counsel to avoid medically complex procedures. They also advise against providing paramedical services, except in emergency situations and even then only with caution. The rationale is that treatment which results in harm to the student could render the teacher liable. It is also contrary to the Nova Scotia Pharmacy Act and Medical Professions Act to administer drugs as part of your job, without having the education and training to do so.

Having parents sign consent and waiver forms may offer limited protection. The parents have no power to release a teacher or school board from liability to the child but having such forms signed might be effective to waive any claim the parent might have in his or her own right for damages suffered by a child. At a minimum such forms involve and inform the parents and are good evidence of a reasonable standard of care [MacKay (1984 a)].

Underlying all this is the question of what organ(s) of the state is (are) responsible for these special needs of children. Is it the Department of Health or Department of Social Services who is responsible? The United States Courts in Irving Independent School District v. Tatro (1984) held that some medical needs should be serviced by some other state agent outside the education system. In Canada, there is an analogous problem concerning the responsibility for the 7-12 year olds who are "acting out" but who are not subject to the Young Offenders Act.

While no one wants unqualified educators to be involved in medical procedures, a simple withdrawal of these services could result in denying many students an access to education. The ideal solution is to have trained nurses or other medical professionals provide the necessary services, but that is not always possible, in times of shrinking educational budgets. Requiring the parents of the relevant children to provide these services would effectively discriminate against working parents and those at the lower income levels. Some state agent has an obligation to provide for the basic medical needs of students with disabilities. A failure to do so would have to be justified as a reasonable limitation on equality as guaranteed in section 15 of the Charter.

In looking at the role of related or auxiliary services with regards to the

content of rights to education consider the role of the school psychologists. Perhaps the most visible input that they have is the administration and interpretation of individual tests of ability and achievement with respect to special education placement. However, studies are being done which cast the reliability of many of these tests in doubt. Also American courts have ruled in Larry P. v. Riles (1972) that intelligence tests were not appropriate tools for determining whether black students should be placed in classes for the educable mentally handicapped and in Diana v. State Board of Education (1974) that unilingual testing was a violation of equality and concluded that children must be tested in the language of the home.

The school psychologists are often the critical person in student classification. Kimmins (1985) comments that legal recognition of the role and responsibilities of school psychologists in Canadian education acts varies across the country but that the overall picture is one of neglect. There are many ethical and legal issues - such as to whom do they owe a professional duty, the parents, the school board or the student? The matters of handling and releasing information are usually dealt with by school board policy. On the issue of confidentiality the school psychologist is bound by the Professional Code of Ethics and Standards of Canadian Psychological Association but these professional standards may sometimes conflict with the law [Kimmins (1985)]. The services of occupational therapists, speech pathologists and interpreters for the deaf also raise questions of equality and access. There is often a regional bias in the delivery of these auxiliary services.

Having physically accessible programs is imperative for the student with disabilities. Using section 15 of the Charter it could be argued that you are being denied the equal benefit of the laws which create and fund the public transportation system. The argument would be that a government must spend money so as to make the social services available to everyone without discrimination. To put this in the context of the earlier discussions the Courts are unlikely to order precise equality and instead will be working toward providing equality of opportunity but probably not equality of outcome. This is unfortunate and may change as courts become more comfortable with their new Charter role.

In this vein, affirmative action programs should be mentioned. These programs give preferential treatment to a group which has suffered discrimination in the past. It is usually a temporary measure designed to attain a special objective. Section 15(2) does not use "affirmative action programs" but instead "any law, program or activity" which is a much broader phrase. Lepofsky (1984) argues strongly that segregated facilities producing better but still unequal opportunity, does not improve the condition of the group. The group is still treated unequally and is therefore still disadvantaged.

The need to integrate the disabled into the main stream of life is widely recognized but little practiced. Mainstreaming of special education children is still widely resisted by many school boards and some parents of regular stream students. The courts are unlikely to mandate mainstreaming in the early cases. Since auxiliary services are often provided in one location the result can be a ghettoization of the disabled in one particular school. This segregation will have to be justified as a reasonable limit on the equal rights of the disabled to attend the local school. Arguments based on cost will play an important role.

IV Classification of Students and Fair Procedures

It appears from the American experience [Pierce v. Board of Education of Chicago (1976)] and the early Charter cases that section 7 will grant procedural rights but not significantly impede school authorities in deciding what education is appropriate [MacKay (1985 a)]. Section 7 will reinforce the judicial trend requiring fair safeguards. The basic components of fair procedure are a chance to state one's case before an unbiased decision-maker. This administrative law doctrine will be expanded under the Charter.

Procedural protections such as notice and right to a hearing are judicially provided, if not already required by the education statutes (Bill 82 is an example), by the regulations accompanying the appropriate acts or the policy-manuals of individual school boards. Section 7 of the Charter guarantees the "principles of fundamental justice" and is regarded as the closest equivalent to the American "due process" clause.

One of the most intriguing questions emerging from the early case law on the Charter is whether principles of "fundamental justice" will be procedural or substantive. In Re B.C. Motor Vehicle Act (1985) the Supreme Court of Canada held that section 7 does have substantive as well as procedural content and thus can be used to challenge the content of government policy as well as the procedures used to implement it. Substantive review under section 7 would have considerable impact on educational policy. However, to date the education cases Bales (1984), Yarmoloy (1985) and Dolmage (1985), have all taken a procedural approach to section 7 of the Charter. These courts have not challenged the substantive government decision but have insisted that fair procedures be followed before making a special education placement or reassignment.

The classification of students and the subsequent labelling are of vital concern because it can so seriously affect their futures. Hoffman v. Board of Education of New York (1978) is a tragic illustration of the importance of putting the proper label on students. A child with normal intelligence was placed in a class for the mentally retarded when test results indicated he scored one point below placement in a regular class. He stayed in the special class for 11 years before he was retested for purposes of a government grant and the misclassification discovered. Damages were awarded, especially for the trauma of readjustment, but these were denied on appeal.

Since this time it has been recognized both in the United States and in Canada that parents must be provided with "due process" hearings at the initial classification stage. Most notably are the procedural protections provided for in Ontario's Bill 82. Where other Acts are silent (as is the case in Nova Scotia) about placement and removal of students in special education classes, the boards have usually developed policies to deal with such matters. At a recent Dartmouth, Nova Scotia School Board meeting concerning the policy for the education of children with special needs, it was stressed that "it should go in writing as part of the official policy that parents are involved from the first". Thus the imposition of fair procedures under section 7 of the Charter will not seriously disrupt most educators, who are already providing fair procedures in advance of placements and classifications.

Parents need information about the operation of the school and the progress of their children to have any sense of control over education. However, access

to information at times may be difficult and to require a balancing of interests. What if a student confides in a guidance counsellor on the condition that his/her parents not be told? Can a school withhold information from parents because it feels revealing information would result in the child receiving a beating? The answers often depend on the precise facts of a particular situation.

There are three components to mention in regard to the access, privacy and confidentiality of student records and reports. These are (1) confidential documents such as student records should be kept private; (2) students (and parents) should have access to his/her own file; (3) students (and parents) have the right to have errors on the record corrected [MacKay (1984 a) and (1984 e)]. It would appear that both common law and statutory protections are found wanting. Provincial Freedom of Information Acts and some education acts have provisions about student records that are helpful. However protections are mostly in the form of school board policies.

In a review of Canadian legislation MacKay (1986 b) concludes that only Ontario, Saskatchewan and the Yukon directly address the question of access to student records. Such access is of particular importance for special education students because the kind of information on file is more likely to be damaging. The flip side of this coin is the confidentiality of these records and the protection of student privacy. Here again the issue is usually resolved by individual board policies and thus varies greatly. Access is usually given to parents but not students, which may result in challenges based on age discrimination under section 15 of the Charter.

In the United States access to and privacy of student records is much better protected than in Canada [Turnbull (1986)]. Indeed, the United States has many more due process protections built into the special education process. Some commentators, in both Canada and the United States, argue that the Americans are in danger of over-judicialization and of being engulfed in due process. Similar fears are sometimes expressed about Ontario's Bill 82. Canadian courts have been more cautious about imposing procedural protections than their American counterparts, but the trend has been towards increased activism in this area. The Charter will accentuate this trend.

V Teacher Liability for the Special Education Student: Discipline and Educational Malpractice

While the Charter is cast largely in terms of rights, there are corresponding responsibilities to see that these rights are respected. Thus all education officials from the Minister of Education to the front line teacher should be aware of the Charter and its implications for the treatment of students in special education. To properly address this issue would require a separate article on student rights [MacKay (1984 e)] but for present purposes only questions of discipline and educational malpractice will be considered.

A. Discipline and the Treatment of Students with Disabilities

Traditional ways of disciplining students may now be limited by two Charter provisions. The most obvious one in section 12 which states:

> Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

As stated elsewhere [MacKay (1986 b) and (1984 a)] section 12 will likely be applied to schools and not restricted to prisons as in the United States. It is also important to note that the section refers to treatment as well as punishment and the former is a broader concept. A particular behaviour modification program could be regarded as treatment, even though not punishment. Thus special education students, like all others, must not be subjected to cruelty.

Disciplinary action may also be challenged as violating "fundamental justice" in section 7 of the Charter. This would be a substantive interpretation of section 7 but this is open to the courts after Re B.C. Motor Vehicle Act (1985). It is possible that a wider range of actions would violate "fundamental justice" in section 7 than would be considered cruel under section 12 of the Charter.

There are also questions of equality involved in the discipline of students with disabilities. The particular nature of the disability may require different modes of discipline. Equality within the meaning of section 15 of the Charter does not always mean identical treatment. In some special education classes the only way to restrain a child is to physically hold him or her. This would not be acceptable in a regular class but may be appropriate in a special education class, depending on the facts [MacKay (1984 a)]. Such an approach should not be taken too far and educators should remember that different treatment will have to be justified as a reasonble limit on equality in accordance with section 1 of the Charter. The starting premise is that discipline should be administered without discrimination based on disability.

Interesting questions exist as to the proper scope of the section 43 Criminal Code defence to what would otherwise be an assault. Is a person's status as a child set by chronological or mental age? The Supreme Court of Canada in R. v. Ogg-Moss (1985), opted for chronological age. This case also defined "teacher" fairly narrowly and did not extend the protection of section 43 to a residential counsellor. Such conclusions raise concerns for those who operate residential institutions for the mentally or physically disabled [Harmer (1985 b)].

The Supreme Court of Canada in R. v. Ogg-Moss (1985), in concluding that section 43 of the Criminal Code only applies in teaching settings, sets out other conditions that must be satisfied: (1) the offence committed by the child must merit punishment and (2) the punishment inflicted must be reasonable and appropriate tothe offence. The use of physical punishment is only appropriate when the child can appreciate the correction. The use of physical force when dealing with students who suffer from multiple disabilities would therefore not be appropriate. Discipline should be maintained in other ways if at all possible.

Corporal punishment, in all but British Columbia, is still legally available as a means for enforcing school rules, subject to the policies of individual boards or schools. The administration of corporal punishment has not attracted due process protections in the United States [Ingram v. Wright (1977)]. Canadian courts will have to decide whether section 7 will apply to the infliction of corporal punishment. The courts should apply section 7, since the principles of

"fundamental justice" do apply to the suspension of a student.

Even with section 12 of the Charter, sedation of students for control or the use of physical restraint for students who are disturbed and acting out will probably be interpreted by the courts as within the "reasonable limits" clause in section 1 of the Charter. Canadian courts will be reluctant to get involved in determining "appropriate" discipline in the schools. However, they will set the outer limits and invalidate discipline which is cruel or contrary to fundamental justice. Courts will also insist that discipline be administered on a basis of equality.

B. Suspensions and Searches of Special Education Students

Questions of equal treatment for disabled students also arise in the context of suspension and school searches. MacKay (1986 b), (1984 a) and (1984 e) discusses the general Charter impact on suspensions and searches as means of enforcing school rules. The point to be emphasized here is that any usual or different treatment of students with mental or physical disabilities, can be challenged as a violation of equality in section 15 of the Charter. Different treatment does not necessarily violate the Charter, because the comparative groups may not be similarly situated [Lepofsky (1984)]. Even if the groups are comparable, the educators may be able to use section 1 of the Charter to demonstrate that different treatment is reasonable and justified. The burden, however, will be on the educators.

It is fairly common for students with disabilities to act out in class and engage in conduct which would lead to suspension of a regular stream student. This was the situation which arose in Bouchard v. Commissionaires d'Ecoles (1950) and Doré v. Commission Scolaire (1983). These situations may provide examples of where equality will demand different, rather than identical, treatment. Special allowances may have to be made for the disability of the students affected. Transgressions which would result in the suspension of a non-disabled student, may not justify the suspension of a disabled one.

Search powers raise a different version of equality. There are few obvious reasons why a disabled student should be subjected to different standards of search from the non-disabled student. In this instance identity of treatment may offer the best road to equality. The promotion of equality under section 15 of the Charter requires a consideration of the facts of the particular situation and the pragmatic results of identical or discriminatory treatment.

Principals often conduct searches as part of their obligations to maintain order and discipline in the school. Under section 8 of the Charter everyone is to be free from "unreasonable" searches. What constitutes a reasonable search? A principal or teacher must believe that evidence will be found and be acting on a reasonable belief that a student has committed a crime or is carrying a prohibited object or substance or is in violation of some school rule. American courts have found a wide range of school searches to be reasonable [MacKay (1984 a)].

The controversial issue of strip searches arose recently when twenty-four Grade 10 boys between the ages of fourteen and sixteen were subjected to a strip search of the whole class in an Edmonton high school. Since the search was for a

stolen watch it was indeed an outrageous incident and heartening to see that at least the issues of potential Charter violations were raised in the media and that some parents explored the possibility of legal action. Because the boys concerned were disabled there are also questions of equality.

C. Malpractice Suits and Teacher Accountability

Suing teachers for malpractice is largely a matter of common law liability in tort but the Charter may have an indirect impact. To the extent that education is defined as a right under the Constitution, the responsibility of the state to deliver this right in a non-negligent fashion is increased. This accountability also extends to an assessment of whether educational services are provided on a basis of equality. The quality of services provided to disabled students must be as high as that provided to the non-disabled. Increased statutory recognition of special education has also raised concerns about accountability.

The passage of Ontario's Bill 82 has sparked increased concern about teacher liability. In Canada, educational institutions and staff have never enjoyed an immunity from tort liability similar to that afforded their American counterparts. A review of reported educational litigation indicates, however, an apparent immunity from liability for non-physical harm caused by institutional or teacher incompetence, which results in either the student's failure to attain the level of learning or a student being misclassified as to ability or achievement [Foster (1985)].

The policy reasons for the American courts affording educators such protections are not compelling. As Foster (1985) and others have written, there should be a recognition of a legal duty of care owed by educators to their students. Courts should establish both an appropriate standard of care by which to judge the propriety of an educator's conduct and an acceptance of intellectual harm as a tortious injury. Concern of the courts in educational malpractice actions would not be to ensure that all students succeed, let alone achieve, the same level of learning. This could never be achieved given all the variables involved. Rather, it would be to ensure that all students receive the benefit of an education from teachers and educational institutions who meet a minimum acceptable level of competency.

Although the American cases, including Hoffman (1978) suggests immunity is available in the United States it appears that in Canada there could be a liability for broken minds as well as bones. It will be hard to show cause but the Canadian courts may, in the appropriate circumstances, be prepared to hold educators accountable for the quality of the services they provide. O'Reilly (1985) is less optimistic about the chances of Canadian malpractice suits. He cites the inexact nature of education, the general deference of courts to school administrators and the concern about the economic impact on school boards as likely reasons for rejecting malpractice suits. Some of these factors are changing and in particular more steps have been taken towards internal accountability for teachers.

The American state laws and Ontario's Bill 82 have established elaborate administrative procedures for assessing which students qualify as "handicapped" or "disabled" and for identifying the "appropriate" special education program

which the district will fund. Once it is concluded that the student is "exceptional" a pupil evaluation team must meet with the child's parents to develop an "individualized education program" (I.E.P.). It is a written statement for each exceptional child and includes a statement of special educational services to be provided. Educators also must develop an annual statement of placement identifying the school, the program and the services being provided. If parents disagree with any decisions they have an opportunity to appeal to an impartial administrative tribunal.

These I.E.P. are valuable in that they ensure proper planning is being done and that the parent is involved throughout the process of special education services being provided to his/her child. Failure to do or to deliver on an I.E.P. might present grounds for liability on the basis of teacher or institutional incompetence. Whether the Charter's focus on courts will extend to malpractice suits remains to be seen.

VI Reasonable Limits and Cost

All the Charter rights (with the possible exception of gender equality in section 28) are subject to the section 1 reasonable limits clause. The Supreme Court of Canada in R. v. Oakes (1986) stressed that section 1 must be applied cautiously. There must be a proportionality between the governmental objective and the means employed. The objective must be a pressing and substantial one and the means adopted must limit rights to the smallest extent possible. Chief Justice Dickson in R. v. Oakes (1986) emphasizes that giving effect to rights will be the norm and limitations on them the exception.

Can the school boards plead financial restraint or administrative inconvenience as "reasonable limits" under section 1 of the Charter for failing to provide equality to students who are disabled? Lack of funds is no answer to inequality of educational opportunity. It cannot be an absolute defence but may form a limited defence, and one of the factors to be considered by the courts [Singh v. Minister of Employment (1985)]. The school board would have to present a reasonable and feasible plan for bringing itself into conformity with section 15 within a reasonable time period. This approach would allow costs to be spread out and absorbed without undue disruption to government services.

Another possible challenge under section 15 of the Charter is the regional and provincial discrimination regarding special education services. An interesting example of such a challenge can be seen in the United States decision of San Antonio v. Rodriguez (1973). A group of parents challenged the school finance system. A challenge to the allocation of funds was made on the basis that children in poor districts were not given the same opportunity as those in wealthier ones. The parents lost and the system of school financing survived the constitutional challenge. This was in part due to the fact that economic discrimination produces only minimal scrutiny in the United States and the general judicial reluctance to mandate expending government funds. If Canada adopts a similar approach, then attacks upon how a school board allocates its funds will be difficult to sustain. However, if the funds are distributed in such a way as to violate one of the listed grounds, the school authority may be in greater difficulty. For example, unequal distribution of funds for special education services between regions of a province may also be a violation on the basis of disability, and thus harder to defend [MacKay (1986 a)].

Section 36 of the Constitution Act, 1982 spells out the federal and provincial governments commitment to eliminating regional disparities and providing essential public services to all Canadians. A "commitment" by a government is not, however, the same thing as giving a guarantee of a right. It expresses the government's good intentions and can be used to help interpret other parts of the Constitution Act

De Zwager and Stewart (1983) argue that the government is committed not only to providing essential public services but also to paying for them under section 36; the Constitution anticipates that an order for government funding can be given as a "remedy" under section 24 of the Charter. Section 36 could also be used to defeat an argument by a government that the denial of Charter rights for the disabled is justified because of the cost involved. A broader and more compelling point raised by de Zwager and Stewart (1983) is that there is something offensive about putting a price tag on the cost of educating a human being. Money can often be found if governments are willing to rearrange their priorities.

VII Concluding Thoughts

There has been recognition, as early as Brown v. Board of Education (1954) of the vital nature of education in a free and democratic society. Considering how crucial education is to the liberty and security of all persons leads to the conclusion that a price tag cannot be put on educating a human being. Weighed against the concerns about the increased costs of judicial intervention into the educational system should be the reality of the even greater costs to society if educational equality is not provided.

The Charter, especially sections 7, 15 and 24 is a new tool to fight for the rights of students who are disabled. It is important that education be provided to all on the basis of equality and that those students with mental or physical disabilities have full access to the benefits of education. If the Charter cannot be used to improve the position of the disadvantaged in Canadian society, then it was hardly worth the effort. In order to achieve true equality the government must initiate positive programs and ensure that they are accessible to all. Simply refraining from discrimination is not enough to correct the persistent inequities that face the disabled in Canada. If the courts are at all creative under section 24 in granting remedies for violations of the rights of the disabled, it may be possible to attain goals through legal action which could not be achieved legislatively.

Accepting that some Charter challenges can be prevented, while others are inevitable, adds to the accountability of the teachers and the educational institutions. Setting standards of competency will force teachers and the educational institutions to think more clearly about their jobs and the ultimate beneficiaries will be the students for which the educational system exists. Faced with providing "appropriate" education to those students who need special education, educators and judges are being presented with the challenge of becoming partners in implementing equality in the schools.

In some respects the arrival of the Charter will be a curse for those involved in education. On occasion concerns about legal liability will stand in the way of good educational practice. On balance, however, the Charter may prove

to be more of a blessing, especially for the disabled consumer of educational services. To the extent that it will be a curse it is reminiscent of the Chinese curse - "may you live in interesting times". Interesting times lie ahead for lawyers, educators and students.

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